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No. 84-1149

In The
Supreme Court of the United States
October Term, 1984

LISA LITCHFIELD,

Petitioner,

vs.

STEVEN SPIELBERG; MCA, INC.; UNIVERSAL STUDIOS, INC.; EXTRA-TERRESTRIAL PRODUCTIONS; KATHLEEN KENNEDY; NED TANEN; and MELISSA MATHISON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondents,[1] Steven Spielberg, MCA Inc., Universal City Studios, Inc., Extra-Terrestrial Productions, Kathleen Kennedy, Ned Tanen and Melissa Mathison, oppose the Petition for Writ of Certiorari. Petitioner does not, and cannot, show that any special or important reasons exist to justify this Court's review of the issues decided by the lower courts in dismissing the copyright infringement claim on motion for summary judgment.

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OPINIONS BELOW

The July 6, 1984 opinion of the Court of Appeals is reported at 736 F.2d 1352 (1984); the June 16, 1983 Memorandum Opinion of the United States District Court for the Central District of California is unofficially reported at 1983 Copyright Dec. (CCH) ¶25,541 and 9 Media L. Rptr. 1962 (1983).

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[1] MCA and/or Universal have the following partially owned subsidiaries and/or affiliates: *Domestic Subsidiaries:* Fontaine Music Corp.; MCA New Ventures, Inc.; Mood Music Company, Inc.; Motion Picture Export Association Of America, Inc.; MPD Leasehold Corp.; Overland Stage, Inc.; Roncom Films, Inc.; Supreme Music Corporation; Two-Beat Music Corp.; Western Costume Co.; *Foreign Subsidiaries:* Afram Films, Inc.; American Motion Picture Export Company, Inc.; CIC International Corporation N.V.; Eugene Music Limited; Evita Music Limited; Jeeves Music Limited; Pincus-Gil Music Pty. Limited; Rawlou Music Limited; Regent Investments Pty. Limited; Spoone Music Pty. Limited; Spoone Music Limited; Tangerine Music Pty. Limited; Town Cinema Investments Pty. Ltd.; United International Pictures B.V.; Valley Music Limited; *Affiliates:* Discovision Associates; Saticoy Technology, Inc.; Hotel Two Associates; Musifilm, Ltd.; Oak Industries Joint Venture; Optical Programming Associates; T.E.M. Programs International; Thoremca Productions, Inc.; Universal-RKO; USA Network.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the provisions referred to in the Petition, this case involves:

First Amendment

"Congress shall make no law . . . abridging the freedom of speech . . ."

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STATUTES INVOLVED

In addition to the statutes referred to in the Petition, this case involves 17 U.S.C. section 102(b) which provides in relevant part that "in no case does copyright protection for an original work of authorship extend to any idea . . . [or] concept . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work."

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COUNTERSTATEMENT OF THE CASE

In June 1982, respondent Universal City Studios, Inc. began distributing what became the most financially successful motion picture in history, "E.T.: THE EXTRA-TERRESTRIAL" ("E.T." hereafter), directed by Steven Spielberg and produced by his company, Extra-Terrestrial Productions, from the screenplay written by Melissa Mathison.

On August 3, 1982, petitioner Lisa Litchfield ("Litchfield" hereafter) commenced her civil action. Litchfield's

second amended complaint alleged that "E.T." infringed two versions of her copyrighted play "LOKEY FROM MALDEMAR" (*"Lokey"* hereafter), that such copying also constituted unfair competition and that because defendants did not give Litchfield screen credit as a creator of E.T., the movie misrepresented story authorship in violation of the Lanham Act section 43(a), 15 U.S.C. § 1125(a). Additionally, Litchfield alleged breach of an implied-in-fact contract and breach of a confidence. Clerk's Record ["C.R." hereafter] 19.

Jurisdiction in the district court depended on 28 U.S.C. section 1338(a) for the copyright infringement and Lanham Act claims, and on 28 U.S.C. section 1338(b) for the pendent claims.

On February 9, 1983, the District Court granted defendants' motion to dismiss the claims for unfair competition and misrepresentation of story authorship. C.R. 28. On February 7, 1982, the District Court ordered plaintiff to show cause why the pendent claims (breach of contract and breach of confidence) should not be dismissed, Reporter's Transcript ("R.T." hereafter) 2/7/83, at 4. However, on February 9, 1983, the court reserved judgment as to those claims. C.R. 28.

On March 15, 1983, defendants moved for summary judgment on the copyright infringement claim. For sake of argument only, defendants assumed that Litchfield owned a properly registered copyright in her two versions of the *Lokey* play and that defendants had "access"[2] to

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[2] The assumption that access existed is commonly made to simplify summary judgment motions because a defendant

(Continued on the next page)

Lokey during their creation of *E.T.*, C.R. 33, at 15. That motion asked the district court to find as a matter of law that no actionable similarity existed between the subject works. Defendants' motion papers included copies of the two versions of *Lokey* and of the *E.T.* continuity.[3] C.R. 36, 37, 38.

Litchfield responded, in part, by filing a cross-motion seeking a summary judgment of liability. C.R. 41. At the hearing on the motions, the district court denied Litchfield's cross-motion[4] and took defendants' summary judgment motion under submission. R.T. 5/23/83, at 10; C.R. 52.

After viewing the *E.T.* movie and reading the *Lokey* plays, C.R. 53, at 1, on June 13, 1983, the district court

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may legitimately avoid infringement by intentionally making sufficient changes in a work to avoid substantial similarity. *Warner Bros., Inc. v. American Broadcasting Companies, Inc.*, 720 F.2d 231, 241 (2d Cir. 1983); 3 M. Nimmer, *Nimmer on Copyright*, § 13.03[B] at 13-43 (1984) ["*Nimmer*" hereafter]. "Copying deleted or so disguised as to be unrecognizable is not copying." *See v. Durang*, 711 F.2d 141, 142 (9th Cir. 1983). *See also* note 17 *infra* & accompanying text.

[3] The "continuity" is a written version of the motion picture that contains dialogue and a written description of the action prepared from the finished film. *See Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939); 150 F.2d 612 (2d Cir. 1945), *cert. denied*, 327 U.S. 790 (1946).

[4] Litchfield had the burden *on her cross-motion* to demonstrate by evidence of access and substantial similiarity of expression that *E.T.* infringed. 3 *Nimmer*, § 13.01[B], at 13-5 to 13-6. She failed to offer evidence of access and could not rely on defendants' assumption of access, which defendants made solely for the sake of testing similarity on their motion, to succeed on her cross-motion. *See* 10A Wright, Miller & Kane, *Federal Practice & Procedure* § 2720 at 20 (2d ed. 1983).

granted defendants' motion for summary judgment and disposed of Litchfield's remaining pendent claims.[5] C.R. 53, 54. The copyright infringement claim was dismissed on the alternative grounds that *E.T.* was not substantially similar to either the general ideas or the protectible expression in *Lokey*. Litchfield's Petition raises questions concerning only the claim for copyright infringement.

Reviewing the propriety of summary judgment *de novo,* and viewing the inferences in the light most favorable to the plaintiff, 736 F.2d at 1356 (Pet. App. A, p. 4), the Court of Appeals affirmed the judgment of dismissal applying the *extrinsic* and *intrinsic* tests required in the Ninth Circuit by *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1162-64 (9th Cir. 1977) (*"Krofft"* hereafter). 736 F.2d at 1356. The Court of Appeals first analyzed the works under an *extrinsic* test that focused on the objective general ideas of the works: the characters, plot, theme, dialogue, mood, setting, pace, and sequence of events. The court rejected Litchfield's list of random similarities because the list ignored the sequence and essential patterns of the works. Secondly, applying the *intrinsic* test, it found that reasonable minds could not differ as to the absence of substantial similarity in expression because the total concept and feel of the works was completely different: no lay observer would recognize *E.T.* as a dramatization or picturization of *Lokey*. 736 F.2d at 1357 (Pet. App. A, p. 6).

The Court of Appeals also rejected as **"frivolous"** Litchfield's claim that *E.T.* infringed Litchfield's copy-

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[5] Those claims were not dismissed on the merits.

right to make derivative works of *Lokey* if it appeared that *E.T.* was "based upon" *Lokey* even though no "substantial similarity" of expression existed. 736 F.2d at 1357 (Pet. App. A, pp. 6-7).

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REASONS FOR DENYING THE WRIT

Petitioner has failed to demonstrate the existence of "special and important reasons"[6] justifying review of the Court of Appeals' decision.

I

THE COURT OF APPEALS' DECISION REFUSING TO REPLACE THE SUBSTANTIAL SIMILARITY STANDARD WITH A "BASED UPON" STANDARD TO DETERMINE INFRINGEMENT OF THE "DERIVATIVE WORKS" RIGHT GRANTED BY 17 U.S.C. § 106(2) NEITHER CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS NOR INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW THAT NEEDS TO BE SETTLED BY THIS COURT.

Petitioner contends that the "salient issue in this case is to define what constitutes infringement of the right to prepare derivative uses." (Pet. 3). No federal court has ever departed from the time-honored "substantial similarity" test for infringement. Petitioner has cited no contrary decision. She simply urges the Court to abandon the "substantial similarity" test for some unprincipled "based upon" test.

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[6] Supreme Court Rule 17.1.

Copyright infringement is generally proven by plaintiff's ownership of the copyright and unconsented copying by the defendant. 3 *Nimmer*, § 13.01 at 13-3. Copying is ordinarily proven by a showing that defendant had access to the plaintiff's work and that there is "substantial similarity" between the protectible expression in the subject works. *Id.*, § 13.01[B], at 13-6.

The "substantial similarity" standard was developed judicially to accommodate two concerns. Early on, the courts ruled that duplication or verbatim copying is not required to prove infringement, "else a plagiarist would escape by immaterial variations." *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (Learned Hand, J.), *cert. denied*, 282 U.S. 902 (1931). However, balanced against this consideration is the long-standing tenet of copyright law that copyright protection is given only to the particular *expression* of ideas, never to the *ideas* themselves. *See, Mazer v. Stein*, 347 U.S. 201, 217 (1954).[7] Obviously, if the similarities between two works are non-literal, infringement must still rest on a finding that "expression" is taken, else the copyright monopoly would be extended to ideas.[8] The "substantial similarity"

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[7] Some judges and commentators have stated that this idea/expression dichotomy is mandated by First Amendment principles. *E.g., Lee v. Runge, cert. denied*, 404 U.S. 887 (1971) (Douglas, J., dissenting); *Krofft*, 562 F.2d 1157, 1170; 1 *Nimmer*, § 1.10[B] at 1-72 to 78. And *see, Zacchini v. Scripps-Howard Bdcstg. Co.*, 433 U.S. 562, 577 n.13 (1977) (dictum). Too broad a protection for the first author would, of course, defeat the copyright goal of encouraging the useful arts. "Substantial similarity" thus defines the point where copying takes expression and not just ideas.

[8] As Circuit Judge Learned Hand noted long ago in *Nichols v. Universal Pictures Co.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931):

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standard functions to focus on the need to distinguish between similarities as to unprotected ideas and protectible expression. 3 *Nimmer* § 13.03[A] at 13-19 to 13-21.

In a case such as this, where Petitioner does not claim verbatim copying, application of the "substantial similarity" test begins by defining the protectible expression of the two works . When the essence of the plaintiff's work is a story, and the allegedly infringing work is accused of duplicating the fundamental essence or structure of the work, courts have often invoked Learned Hand's "abstractions" test, note 8, *supra,* or Professor Chaffee's "pattern test". *Warner Bros., Inc. v. American Broadcasting Companies, Inc.,* 720 F.2d 231, 240 (2d Cir. 1983).

The "pattern test" draws the line between idea and expression in a complex dramatic work by defining protectible expression to include "the sequence of events, and the development of the interplay of characters". Chaffee, "Reflections on the Law of Copyright" 45 *Colum.L.Rev.* 503, 513 (1945).[9] The pattern test thus protects the con-

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> "Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about . . .; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended."

[9] Because "substantial similarity of expression" is a conclusion representing the delicate balancing of the copyright policy and First Amendment interest in a particular factual

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crete pattern of the work as a whole. When no verbatim copying exists, the elements that make up this pattern constitute protectible expression only in their particular combination and sequence in a plaintiff's work.

The legislative history for the Copyright Act of 1976[10] expressly endorses and perpetuates the idea-expression dichotomy[11] and Congress codified it in the rubric that "ideas" are not protectible under copyright law. 17 U.S.C. § 102(b). It has been held that the rules for determining "substantial similarity" are the same under both the 1976 and the 1909 Acts. *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 912 & n.10 (2d Cir. 1980).

Nevertheless, petitioner seems to contend that she did not have to prove "substantial similarity" between the *E.T.* movie and her *Lokey* plays because she claimed infringement of her "right to prepare derivative works" under section 106(2), instead of her section 106(1) "right to reproduce" her work. She argues that to prove infringement

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setting, Judge Hand was correct in stating "obviously, no principle can be stated as to when an imitator has gone beyond the 'idea', and has borrowed its 'expression'. Decisions must therefore inevitably be *ad hoc*." *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2nd Cir. 1960).

[10] The history is summarized in *Mills Music, Inc. v. Snyder*, No. 83-1153, — U.S. —, 53 U.S.L.W. 4035, *Slip Op.* at 5-7, n.14-25 & accompanying text (January 8, 1985).

[11] "Section 102(b) . . . in no way enlarges or contracts the scope of copyright protection under the present law. Its purpose is to restate . . . that the basic dichotomy between expression and idea remains unchanged." House Report No. 94-1476, *as reprinted in* 17 U.S.C.A. § 102 at 18 (1977).

of a section 106(2) right she need only show that *E.T.* is in some indefinite sense "based upon" her play—even if *E.T.* is not substantially similar to the protectible expression in *Lokey*. (Pet. 3-6).[12]

In support of her novel position, petitioner argues that the "derivative work" right is a concept new to the 1976 Act (Pet. 3), that the statutory language and the legislative history of the 1976 Act evidence an intent that infringement of the right to make a derivative work be measured by a broader "based upon" standard, (Pet. 3, 4 n.1, 5), and that such a new standard "for measuring infringement of derivative rights" is suggested by Professor Paul Goldstein in a recent article (Pet. at 11-12).

Petitioner is incorrect on all counts.

While the *term* "derivative work" may be new to the 1976 Act, the *concept* of the right to make a derivative work certainly is not new to copyright law.[13] Compare 17 U.S.C.

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[12] Litchfield also argues, for the first time, that the 1976 Act shifts the focus of the inquiry to determine infringement from the idea/expression dichotomy to fair use. (Pet. 17, 19 n.8). Of course, no authority is cited for this radical departure from copyright law. There is none. Petitioner invites the Court to measure infringement solely by the impact one work has on the other in the market place, without regard to whether any protectible expression has been taken. "Fair use" considerations apply only *after* it is clear that the use otherwise infringes. 17 U.S.C. § 107; *Sony Corp. v. Universal City Studios, Inc.*, 104 S.Ct. 774 (1984) (majority and dissenting opinions); 3 *Nimmer* § 13.05 at 13-62 to 13-64.

[13] The first derivative rights were recognized by Congress in the 1870 Copyright Act, which provided that "authors may reserve the right to dramatize or to translate their own works." Act of July 8, 1870, 16 Stat. 212, c.230 § 86, 41st

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§§ 1(b) (right "to make any other version thereof, if it be a literary work") and 7 (1909 Act) with 17 U.S.C. § 101 (definition of "derivative work" under 1976 Act). *See also, Reyher v. Children's Television Workshop,* 533 F.2d 87 (2d Cir.), *cert. denied,* 429 U.S. 980 (1976); 1 *Nimmer,* § 3.01 & n.2.

Petitioner's "plain language" reading of section 106 (2), (Pet. 4-6, 11-12), is erroneous in fact and misapprehends the function of an infringement test. No act of Congress has even purported to state the test for copyright infringement. *See* 17 U.S.C. § 101 (1909 Act) ("if any person shall infringe"), 17 U.S.C. § 501(a) (1976 Act) (simply prohibits "violation" of exclusive rights granted in § 106. The "substantial similarity" test has never been expressly codified because, like "negligence", it defies precise formulation. *See* note 9, *supra.* Petitioner's proposed "based upon" test for determining infringement would re-

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Cong., 2d Sess. The 1909 Act continued the right to dramatize and to arrange or adapt a musical work and added the right to "make any other version thereof, if it be a literary work." Act of March 4, 1909, § 1(b), 60th Cong., 2d Sess. The 1976 Act expanded and simplified the earlier grants by conferring the right to prepare derivative works for all forms of copyrighted works. 17 U.S.C. § 106(2).

In one of the earliest cases involving the alleged infringement of the derivative right, this Court in *Kalem Co. v. Harper Bros.,* 222 U.S. 55, 56 L.Ed. 92, 32 S.Ct. 20 (1911) affirmed a judgment that defendants' motion picture, *Ben Hur,* infringed plaintiff's copyright in a novel of the same name. Two of the leading copyright decisions written by Judge Learned Hand involved alleged infringements of a play by a motion picture, *Sheldon v. Metro-Goldwyn Pictures Corp.,* 81 F.2d 49 (2d Cir.) *cert. denied,* 298 U.S. 669 (1936); *Nichols v. Universal Pictures Corp., supra,* 45 F.2d 119 (2d Cir. 1930).

place a test having decades of judicial gloss with a test having no principled limits.

Although Petitioner finds an infringement test in the words "based upon" which Congress used to define a derivative work, 17 U.S.C. § 101 (definition of "derivative work"), there is no reason to impute to Congress an intention to create a new test for infringement. Rather, section 101 simply states the minimum requirement to constitute one work as derived from another. In a broad sense all works are derivative works because they are all derived from pre-existing works to some extent. 1 *Nimmer*, § 3.01 at 3-2. However, as Professor Nimmer notes:

> [T]he term derivative work in a technical sense does not refer to all works which borrow in any degree from pre-existing works. A work is not derivative unless it has *substantially copied* from a prior work. *If that which is borrowed consists merely of ideas and not the expression of ideas,* then although the work may have in part been derived from prior works, *it is not a derivative work.*

Id., § 3.01 at 3-3 (citations omitted; emphasis added).[14]

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[14] *See also* 2 *Nimmer* § 8.09[A] & n.8. Several courts have adopted Professor Nimmer's conclusion that derivative works must by definition be "substantially similar" to expression in the works on which they are based. *See, e.g., Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); *Harry Fox Agency, Inc. v. Mills Music, Inc.*, 543 F.Supp. 844, 849 (S.D.N.Y. 1982), *rev'd. on other grounds*, 720 F.2d 733 (2d Cir. 1983), *reversed, sub. nom., Mills Music, Inc. v. Snyder*, No. 83-1153, — U.S. —, 53 U.S.L.W. 4035 (Jan. 8, 1985); *Mid-way Mfg. Co. v. Artic International, Inc.*, 211 U.S.P.Q. 1153 (M.D. Ill. 1981). No courts have held otherwise.

Although *Fink v. Goodson-Todman Enterprises, Ltd.*, 9 Cal. App. 3d 996, 1008, 88 Cal. Rptr. 767 (1970), relied upon by petitioner (Pet. 4-5), stated that "'based upon' does seem to be something a little different than having substantial similarity", *Fink* did not endorse the "based upon" test for copyright purposes. In *Fink*, the court simply accepted the complaint's allegation that the "based upon" standard was voluntarily assumed by an express or implied *contract*, not imposed as a matter of law by common-law or statutory copyright principles.[15] *Fink* only serves to illustrate that the "based upon" test proposed by petitioner would greatly expand liability contrary to copyright principles.

The legislative history relied upon by petitioner does not dispense with the "substantial similarity" test. The *House Report* suggested that the reproduction right, section 106(1), would be infringed if a work was reproduced in whole or in "any substantial part", while a section 106(2) derivative work right would be violated where a work "incorporate[d] a portion of the copyrighted work in some form". *House Report*, No. 94-1476, *as reprinted in* 17 U.S.C.A. § 106. The difference in language does not justify petitioner's conclusion. If anything, this history plus the clear statement by Congress under 17 U.S.C. § 102(b)

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[15] In deciding whether the complaint properly pleaded a contract cause of action, the *Fink* court highlighted the difference between contract and copyright principles: "There is no legal requirement that material must be of the protectible type to be the subject of a contract calling for compensation if another creates a work based upon it. This is because a contract creates no monopoly; it is effective only between the contracting parties; it does not withdraw the idea from general circulation or place a restraint on progress in art." 9 Cal. App. 3d at 1008.

that copyright protection does not extend to an idea reaffirms the pre-1976 case law requiring that "substantial similarity" be shown in all cases of infringement. Note 11, *supra.*

Petitioner completely misunderstands (Pet. 11-12) the point made in Professor Goldstein's recent article. Goldstein, "Derivative Rights and Derivative Works in Copyright" 30 *J. Copyright Soc'y U.S.A.* 209, 217 (1983). Professor Goldstein simply argues that some courts have failed to account sufficiently for the difference in the media in which the conflicting works were produced in determining whether one work was substantially similar to the other in its protectible expression. He reaffirms "substantial similarity" as the appropriate test, provided that the differences in the works' formats are considered as one factor. *Id.* at 226.

The decisions of the Ninth Circuit Court of Appeals and other circuits, in applying a "substantial similarity" test, already make the allowances to which Professor Goldstein refers. In comparing a play and a motion picture in *Nichols v. Universal Pictures Corp., supra,* 45 F.2d at 121, Judge Hand noted that "as respects plays, the controversy chiefly centers upon the characters and sequence of incident, these being the substance." In the case at bar, the Ninth Circuit appropriately considered the difference in the formats in including that the motion picture *E.T.* was neither the "picturization" nor the "dramatization" of petitioner's play. 736 F.2d at 1357. *See also, Kalem v. Harper Bros., supra.*

The Petition inconsistently argues that the present "substantial similarity" test is and is not different in ap-

plication from the "based upon" or "equivalency" test urged by petitioner. At times, petitioner is seemingly oblivious to the impact of her concessions that the "pattern" and "abstraction" tests of substantial similarity (Pet. 13) and the idea/expression dichotomy comport with case law and "remain a useful approach" (Pet. 16-17).

She does indicate a material difference in her approach in discussing the adapation of the novel *Cinderella Liberty* into a motion picture to illustrate her "doctrine of equivalency." (Pet. 13). Petitioner implies that if a defendant's work began as an adaptation of the plaintiff's work, the resulting work must be considered to be "based upon" the plaintiff's and thus an infringement even if the resulting work borrows only ideas and not expression. This indeed would constitute a basic change in copyright law. *See, e.g., Gethers v. Blatty,* 283 F.Supp. 303 (C.D. Calif. 1968) (although the defendant admittedly began his work as an adaptation of plaintiff's screenplay, defendant's resulting work was so different as to escape liability). *See also,* note 2, *supra.*

It thus becomes manifest that what is really at stake here is the availability of summary judgment to rid the courts (and author-defendants) of nuisance suits. Unfortunately, writers and directors associated with financially successful motion pictures and books too often find themselves the targets of unmeritorious lawsuits such as this one.[16] While such suits may possess all of the excitement

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[16] This statement is not hyperbole. This is the fifth suit challenging the originality of *E.T.* In *J.A.R. Sales v. MCA Inc., et al.,* No. 83-4188 (C.D. Calif. 1983), District Judge Hauk dismissed plaintiff's claim that E.T. was substantially

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of a lottery to the plaintiff and his or her counsel, they are an enormous drain on a defendant author's time and other resources. It is for this reason that defendants typically assume "access" for sake of argument when moving for summary judgment for lack of substantial similarity. If that motion fails, then defendants move to the next line of defense, lack of access. However, when that issue is raised, all of the major creative elements including directors, writers, producers, creators of special effects, etc. must undergo protracted depositions that examine in painstaking detail every step of their creative effort. If such a case goes to trial, the expenditure of time and money to reconstruct the creative process of producing a movie is even greater.

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similar to a dinosaur-like creature in a 1978 movie. An appeal is pending. In *Baxter v. MCA Inc.*, No. CV 83-7081-HLH (C.D. Calif. 1983), plaintiff claimed that the music in the E.T. film was copied from his 1954 song. District Judge Hupp granted summary judgment for lack of substantial similarity, on Oct. 24, 1984. An appeal is pending. In *Louis Elias Tzanetakos v. Consulate General of Greece*, No. 83-3054 (N.D. Cal. 1983), plaintiff claimed the makers of "E.T." had stolen his initials. The case was dismissed on December 6, 1983. In *Kaufman v. Mathison, et al.*, No. CV 83-7658-TJH (C.D. Calif. 1983), plaintiff claimed that *E.T.* infringed his children's story about a Costa Rican invisible frog with a glowing heart that befriends a little girl while stranded in the U.S. District Judge Hatter granted summary judgment for lack of similarity on December 26, 1984.

This is not an isolated situation. The makers of another successful movie, "Coming Home", were sued at least twice for copyright infringement. Both claims were dismissed by summary judgment for lack of substantial similarity. *Jason v. Fonda*, 698 F.2d 966 (9th Cir. 1982); *Davis v. United Artists, Inc.*, 547 F.Supp. 722 (S.D.N.Y. 1982).

If the broad "based upon" test urged by the Petition were adopted, no summary judgment would be possible as long as there was a triable issue of access.[17] The deterrent to creativity would be substantial.[18]

As has been shown above, the "substantial similarity" test already considers such factors as the differing formats in which the opposing works appear. The Petition is thus reduced to a request either (1) to have this Court undertake the continuing administration of the application of the mixed fact-law test typically applied in *ad hoc* situations, having little or no continuing precedential value, or (2) to create a new broader "based upon" test for infringe-

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17 The "access" problem is well illustrated by this case. It is virtually impossible to prevent would-be authors from finding new ruses to get their works to someone at the studio. Litchfield complains (Pet. 18 n.8), about respondents' assumption of access by the office of Universal's Ned Tanen. However, when she learned that the first E.T. script was written at a rival studio, Columbia (the E.T. project was later acquired by Universal), she "recalled" giving copies to Spielberg and to someone else on the Columbia lot. Although respondents vigorously deny such access, they must depend on the lack of similarity to obtain a summary adjudication of a specious claim.

18 In libel and civil rights decisions, courts often cite the "chilling effect" of protracted and expensive litigation as an additional reason for speedy resolution to effectuate First Amendment interests. *E.g., Dombrowski v. Pfister,* 380 U.S. 479, 486-87 (1965); *Reader's Digest Assn., Inc. v. Superior Court,* 37 Cal. 3d 244, 251-52, — Cal.Rptr. —, — P.2d — (1984). The idea/expression dichotomy of copyright law is mandated by First Amendment principles. Note 7, *supra.* Thus, recent decisions stress the importance of early summary adjudication in copyright cases. *E.g., Warner Bros., Inc. v. American Broadcasting Companies, Inc.,* 720 F.2d 231, 245 (2d Cir. 1983).

ment that would allow plaintiffs to claim a monopoly over ideas contrary to 17 U.S.C. section 102(b), at the expense of First Amendment principles and of the Copyright Act's policy to promote the arts.[19]

The Court of Appeals was correct in describing petitioner's argument on this point as "frivolous". 736 F.2d at 1357, Pet. App. A at 7.

II

THE COURT OF APPEALS' DETERMINATION OF THE SUBSTANTIAL SIMILARITY ISSUE BY REFERENCE TO THE WRITTEN VERSIONS OF THE SUBJECT WORKS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The petitioner's second "question presented" is not separately discussed in either the summary of argument or the argument sections. While that fact might be taken as a concession that no special or important question is presented, out of an abundance of caution, respondents treat the issue here.

Petitioner complains that the district court denied her cross-motion for summary judgment before reading the works (Pet. 19, n.8). Respondents have already explained why that action was appropriate. Note 4, *supra*.

The Court of Appeals' refusal to view the *E.T.* movie was not an "abuse of discretion [or] clearly erroneous" (Pet. 18 n.8). The decision to rely upon the written con-

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[19] Copyright policy affirmatively encourages the free and unrestricted use of ideas found in copyrighted works. *E.g., Sheldon v. Metro-Goldwyn Pictures, supra,* 81 F.2d at 54 (L. Hand., J.); 1 *Nimmer* § 1.10[B] at 1-74.

tinuity instead of the movie itself involved a "best evidence" issue.[20] *Federal Rule of Evidence 1002 & Advisory Committee's Note.* In fact, by comparing petitioner's written play with the respondent's written continuity, the Court of Appeals mitigated what petitioner otherwise complains were differences arising from the different media of the two works. Finally, although petitioner belatedly argues that a continuity script is never a fair representation of a movie (Pet. 19 n.8), petitioner waived that argument because she never claimed any material difference below. 736 F.2d at 1356; *see also, Federal Rule of Evidence* 1006.

III

NO SPECIAL OR IMPORTANT REASONS JUSTIFY THIS COURT'S REVIEW OF THE RECORD BELOW TO DETERMINE WHETHER THE LOWER COURTS PROPERLY APPLIED THE SETTLED RULES OF SUBSTANTIVE COPYRIGHT LAW AND OF THE SUMMARY JUDGMENT PROCEDURE TO THE FACTS OF THIS CASE.

Parsing the sometimes extravagant and contradictory claims in the petition, one must conclude that petitioner's real lament is that the lower courts wrongly applied the settled rules of law to the particular facts presented, not that the courts applied the wrong rules.

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[20] The Ninth Circuit previously held that it was unnecessary to view a production of a play, rather than rely on a script, where the issue of substantial similarity was not a close one. *See v. Durang,* 711 F.2d 141, 142 (9th Cir. 1983); *see also, Dellar v. Samuel Goldwyn, Inc.,* 150 F.2d 612, 613 (2d Cir. 1945), *cert. denied,* 327 U.S. 790 (1946).

A. The Summary Judgment Procedure

Petitioner misleads herself in her reliance upon *Arnstein v. Porter,* 154 F.2d 464 (2d Cir. 1946) (Pet. 7). In the early years of the federal rule of summary judgment, a debate arose between its draftsman, Second Circuit Judge Charles Clark, and Judge Frank. 10A Wright, Miller & Kane, *Federal Practice & Procedure* § 2727 at 173 (2d ed. 1983). Initially, Judge Frank's views predominated, exemplified by the copyright decision in *Arnstein v. Porter,* 154 F.2d 464, 469 (2d Cir. 1946) (Clark, J. dissenting). Judge Frank determined that summary judgment was improper as long as the plaintiff's theory was not too "fantastic" to present to a jury if "there is a slightest doubt as to the facts."

Soon after the 1963 amendment adding the last two sentences to *Federal Rule of Civil Procedure* 56(e), the Second Circuit abandoned the "slightest doubt" rule for summary judgment in a series of decisions beginning with *Dressler v. M.V. Sandpiper,* 331 F.2d 130, 132-33 (2d Cir. 1964). Also, this Court noted that the change in the Rule required an opposing party to present "significant probative evidence" of the existence of a genuine issue as to a material fact or suffer summary judgment. *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 288-90 (1968).

As a result,

> [T]he decision in *Dressler* makes clear the school of Judge Clark—which stood for a more extensive grant of summary judgment—has emerged leaving cases like *Arnstein* as mere momentos [sic] of law gone by as

> far as the burden of proof on a motion for summary judgment.

6 Pt. 2 *Moore's Federal Practice*, ¶ 56.17 [14] at 56-798 (2d ed. 1982) (footnotes omitted).

Before long, the demise of the "slightest doubt" rule was widely noted and summary judgment became commonplace in copyright decisions in the courts of the First, Second, Third, Fifth and Ninth Circuits.[21]

Contrary to petitioner's contention (Pet. 22 n.14), the Court of Appeals' standard for granting summary judgment based on a lack of substantial similarity—"if no reasonable jury could find substantial similarity"—736 F.2d 1355-56, raises no Seventh Amendment issue. 10 Wright, Miller & Kane, *Federal Practice & Procedure* § 2714 (2d ed. 1983).

B. Application Of Settled Rules For Determining Substantial Similarity

As pointed out above, notwithstanding petitioner's novel "based upon" argument, throughout the Petition she acknowledges the relevance of the idea/expression dichotomy (Pet. 16), and the "useful approach for separating infringing from non-infringing works, especially when the

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[21] *See e.g., O'Neill v. Dell Publishing Co.*, 630 F.2d 685 (1st Cir. 1980) (novels not substantially similar); *Warner Bros. Inc. v. American Broadcasting Companies, Inc.*, 720 F.2d 231 (2d Cir. 1983) (no similarity); *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980) (no similarity); *Universal Athletics Sale Co. v. Salkeld*, 511 F.2d 904 (3rd Cir.), *cert. denied*, 423 U.S. 863 (1975) (no similarity); *Ferguson v. National Broadcasting Co.*, 584 F.2d 111 (5th Cir. 1978) (no access) (specifically noting demise of *Arnstein*); *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983) (no similarity) (noting demise of *Arnstein*).

essence of the work sought to be protected is a story'' provided by the so-called ''pattern'' and ''abstractions'' tests of Professor Chaffee and Judge Hand (Pet. 15-17). She notes that ''the combination of plot features and character interaction is the essence of plaintiff's work.' (Pet. 25). She even concedes that differences in the defendants' work are relevant to the extent that they change the essence or structure of that work so as to make it substantially different from the plaintiff's (Pet. 21-22, n.12). While Litchfield complains because the lower courts found her list of supposed similarities not to be an objective comparison of the concrete pattern of the two works (Pet. 9), her real complaint is that the courts should never be able to determine that issue as a matter of law.[22]

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[22] The Circuit Court rightly noted that parallel lists of "similarities", such as those in the Petition at 13-16, are "inherently subjective and unreliable . . . particularly . . . where . . . the list emphasizes random similarities scattered through the works." 736 F.2d at 1356. One commentator has pointed out just a few of the vices of such lists:

> 1. Any method of comparison which lists and underscores similarities and suppresses or minimizes differences is necessarily misleading.
>
> 2. Parallels are too readily susceptible of manipulation. Superficial resemblances may be made to appear as of the essence.
>
> 3. Parallel-hunters do not, as a rule, set out to be truthful and impartial. They are hell-bent on proving a point.
>
> 4. Parallel-hunting is predicated on the use of lowest common denominators. Virtually all literature, even the most original, can be reduced to such terms, and thereby shown to be unoriginal. So viewed, Mark Twain's *The Prince and the Pauper* plagiarizes Dickens'

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Beginning with the 1977 *Krofft* decision, the Ninth Circuit Court of Appeals has developed a tool of analysis to separate those cases in which the works are manifestly not substantially similar by any test from those in which the works are sufficiently close that a jury ought to determine how a lay audience would react to them. Knowles & Palmieri, "Dissecting Krofft: An Expression of New Ideas in Copyright", 8 *San. Fern. L. Rev.*, 109, 124-31, 148-66 (1980). Thus *Krofft* established a two step analysis. First, the works are to be compared as to their "gen-

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David Copperfield. Both deal with England, both describe the slums of London, both see their hero exalted beyond his original station. To regard any two books in this light, however, is to ignore every factor that differentiates one man's thoughts, reactions and literary expression from another's.

5. Parallel columns operate piecemeal. They wrench phrases and passages out of context. A product of the imagination is indivisible. It depends on totality of effect. To remove details from their setting is to falsify them.

6. Parallels fail to indicate the proportion which the purportedly borrowed material bears to the sum total of the source, or to the whole of the new work. Without such information a just appraisal is impossible.

7. The practitioners of the technique resort too often to sleight of hand. They employ language, not to record facts or to describe things accurately, but as props in a rhetorical hocus-pocus which, by describing different things in identical words, appears to make them magically alike.

8. A double-column analysis is a dissection. An autopsy will reveal a great deal about a cadaver, but very little about the spirit of the man who once inhabited it.

A. Lindey, *Plagiarism & Originality* 60-61 (1952).

eral ideas," analyzing those matters that can objectively be listed and analyzed: characters, plots, themes, dialogue, sequence of events, and the like.[23] The *Krofft* court held that such matters could often be determined as a matter of law. 562 F.2d at 1164.

The second step of the analysis, application of the *intrinsic* test, involves a comparison of the similarities of expression according to the likely and reasonable perception by a lay audience. Although the *Krofft* court thought that the intrinsic test would usually present a jury question, 562 F.2d at 1165, recent decisions have held that the intrinsic test may be determined by summary judgment where reasonable jurors cannot differ. *E.g., See v. Durang,* 711 F.2d 141, 142 (9th Cir. 1983). Although the other federal Courts of Appeal have not specifically adopted the *Krofft* two-step analysis, their application of the "substantial similarity" test in practice yields similar results. *See, e.g., Warner Bros. Inc. v. American Broadcasting Companies, Inc., supra,* 720 F.2d at 238-43; 3 Nimmer § 13.03 [B]; note 21, *supra.*

Thus, the Petition presents no issue for this Court except to determine on an *ad hoc* basis whether the lower

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[23] In applying the *extrinsic* test to the very simple 30-second commercials before the court in *Krofft,* the *Krofft* court necessarily only focused on a simple statement of the ideas: "a fantasyland filled with diverse and fanciful characters in action." 562 F.2d at 1165. Later cases applying the extrinsic test to complex works such as movies and books hold that comparison of "general ideas" must include plot, themes, dialogue, mood, setting, pace and sequence." *Jason v. Fonda,* 698 F.2d 966 (9th Cir. 1983), *incorp'g,* 526 F.Supp. 774 at 777 (C.D.Calif. 1982); *Columbia Pictures Industries, Inc. v. Embassy Pictures,* Copyright L. Rptr. (CCH) ¶ 25,440 (C.D.Calif. 1982).

courts properly applied the traditional legal standards to the precise facts in this case. This Court's review of such an issue would have virtually no precedential value.

IV

RESPONDENTS ARE ENTITLED UNDER SUPREME COURT RULE 49.2 AND UNDER SECTION 505 OF THE 1976 COPYRIGHT ACT TO AN AWARD OF ATTORNEYS' FEES AND COSTS INCURRED IN RESPONDING TO THE FRIVOLOUS PETITION.

The Court of Appeals appropriately described as "frivolous" the section 106(2) issue raised by petitioner, 736 F.2d 1357 (Pet. App. A at 7). None of the other issues raised by the petition comes any closer to presenting "special and important reasons" justifying review of the Court of Appeals' decision.

Upon the denial of the petition, respondents will be "prevailing parties" according to 17 U.S.C. section 505.[24] Accordingly respondents request an order of this Court directing either the Court of Appeals or the district court to determine the amount of attorneys' fees and costs reasonably incurred by respondents in responding to the Petition and to enter an award accordingly.

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[24] The 1976 Copyright Act, section 505, provides that the court "may also award a reasonable attorney's fee to the prevailing party as part of the costs."

V

CONCLUSION

For all the foregoing reasons, respondents respectfully submit that the petition for writ of certiorari ought to be denied and that respondents ought to be awarded their reasonable attorneys' fees and costs.

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